STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 8, 2000
v	No. 210300 Cass Circuit Court
RODNEY ANTHONY HILL, II, Defendant-Appellant.	LC No. 96-008710-FH

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of unarmed robbery, MCL 750.530; MSA 28.798, one count of assault with intent to commit unarmed robbery, MCL 750.88; MSA 28.283, and one count of first-degree home invasion, MCL 750.110a(2)(b); MSA 28.305a. He was sentenced as a fourth habitual offender to serve twelve to forty years of imprisonment on each count, sentences to run concurrently. The court thereafter vacated the assault with intent to commit robbery conviction as being a lesser included offense of unarmed robbery. Defendant appeals as of right his convictions and sentences. We affirm.

On March 27, 1996, defendant, Jevon Bomer and defendant's girlfriend, Brenda Collins, were doing cocaine. When they ran out of drugs and money, they decided to borrow some money from Wyndell Macon, an elderly man who lived alone. Collins, pretending to be Bomer's girlfriend Candy, called Macon and asked for a loan. Macon apparently agreed and said to come over.

The three drove to Macon's home and Bomer went up to the door. Macon recognized Bomer and let him in. Once inside, Macon said he knew it was not Candy who had called. Bomer used the phone to call Candy, who spoke to Macon and told him not to give any money to Bomer. Macon told Bomer to get out of his house and, when Bomer did not leave, Macon allegedly pulled a gun from a cabinet. Bomer then struck Macon, took the pistol and struck Macon a few more times. He testified that Macon was lying on the floor, not moving or talking.

Defendant then entered the home and asked, "What's up?" and "Where's the money?" While Macon was lying on the floor, defendant repeatedly struck him and shouted, "Where's the money?"

Bomer testified that defendant hit Macon with an object and kicked him in the back. When Bomer exited the bedroom with money he had found in Macon's wallet, he pulled the phone cord out of the wall and the two men left the house. Boomer testified that Macon may have been unconscious when they left him. The trio then drove down the street, made a U-turn and, when they neared Macon's house, tossed the gun out the window. They ran out of gas and walked the rest of the way back to Collins' house. They then bought more drugs using the money stolen from Macon and continued to smoke cocaine until ten o'clock in the morning. Bomer then went to the police station and turned himself in.

Bomer gave his statement to the police and ultimately implicated defendant. He had not been given any incentive to confess or to implicate defendant, and no plea agreement was made until two weeks later when suggested by his counsel. Bomer testified at defendant's preliminary examination and at trial. Collins also testified, stating that she, defendant and Bomer drove to the store where she telephoned Macon and told him that Candy said to give Bomer some money. She claimed that they dropped Bomer off and that he later showed up at her house with blood on his shirt. She claimed that defendant never got out of the car or went into Macon's house.

Macon testified that he did not see anyone other than Bomer in his house. When asked if Bomer was the one who hurt him, Macon replied, "I know he's the one, there wasn't nobody else there to hurt me." In his post-conviction motion for judgment notwithstanding the verdict, defendant argued that, since Macon was unconscious, there was no way defendant could have induced him to hand over his money. Since there was no perception of a threat of violence or force, there was insufficient evidence to support convictions for unarmed robbery and assault with intent to rob while unarmed. The trial court held that there was no requirement that the victim be consciously aware of the assault in order for the jury to find defendant guilty. The motion was denied.

The trial court also found that there was sufficient evidence to support the home invasion conviction. The court ruled that the jury could have inferred from the evidence that defendant entered the home with the specific intent to commit larceny since defendant entered the home without permission and the trio had schemed to obtain money from Macon. The court sua sponte ruled that defendant could not be convicted of both unarmed robbery and the lesser included offense of assault with intent to rob unarmed, and thereupon vacated the conviction for assault with intent to rob unarmed.

On appeal, defendant first argues that there was insufficient evidence to support a conviction for home invasion. We disagree. When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516, n 6; 489 NW2d 478, amended 441 Mich 1201 (1992).

Under the plain language of the home invasion statute, MCL 750.110a; MSA 28.305(a), the prosecutor must prove each of the following elements beyond a reasonable doubt:

> First, that the Defendant broke into a dwelling. It does not matter whether anything was actually broken, however some force must have been used. Opening a

door, raising a window, and taking off a screen are all examples of enough force to count as a breaking. Entering a dwelling through an already open door or window without using any force does not count as a breaking.

Second, that the Defendant entered the dwelling. It does not matter whether the Defendant got his entire body inside. If the Defendant put any part of his body into the dwelling after the breaking that is enough to count as an entry.

Third, that when the Defendant entered the dwelling, he intended to commit the offense of assault with intent to do great bodily harm less than murder and/or the offense of murder.

Fourth, that when the Defendant entered, was present in or was leaving the dwelling, either of the following circumstances existed: A, he was armed with a dangerous weapon, or B, another person was lawfully present in the dwelling. [*People v Warren*, 228 Mich App 336, 348-349; 578 NW2d 692 (1998), lv granted on other grounds, 460 Mich 851 (1999).]

Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514.

Defendant claims that he cannot be held accountable as a principal because he only helped make the phone call, drove the car, and entered the home after Bomer had been inside for some time. He states, "Whatever the reason that Mr. Hill became angry about the money, or struck Mr. Macon as he was unconscious, his actions did not constitute a robbery." He claims that there are no facts from which it can be inferred that when defendant entered the home, he intended to rob Macon. He claims that he was merely present and that mere presence, even when there is knowledge of a crime being committed, is insufficient to infer guilt.

Bomer testified that when defendant entered Macon's house, he started beating and yelling at the victim as he was lying on the ground. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential element of intent was proved beyond a reasonable doubt.

Defendant's argument that the prosecution never advanced a theory of aiding and abetting is unpersuasive. One may be convicted as a principal even if he merely aided and abetted in the crime. MCL 767.39; MSA 28.979; *People v Davenport*, 122 Mich App 159, 162; 332 NW2d 443 (1982). Our review of the record refutes defendant's claim that evidence of intent to commit larceny or any other felony was non-existent. Moreover, the jury was instructed that Bomer and defendant were

accomplices. The jury, based on Bomer's testimony, could have concluded that the two acted in consort.

Second, defendant argues that, because Macon was unconscious during the assault, he was not placed in fear and, consequently, there was insufficient evidence to support a conviction for unarmed robbery. The prosecution argues that the fact that defendant yelled at Macon while he was lying on the floor indicates that Macon was not unconscious when defendant was hitting him. Regardless, Macon could be unconscious and an unarmed robbery could still occur.

The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994), citing *People v Himmelein*, 177 Mich App 365, 378-379; 442 NW2d 667 (1989). To support a charge of robbery, the taking of the property must be achieved by either force or by putting the victim in fear. 67 Am Jur 2d Robbery § 22 (1985). There is no need to prove both force and fear; the manner of taking is alternative. *Id.* "[T]o knock another down and take his property from him while he is unconscious, and therefore unable to experience fear, is robbery." *Id.*

Bomer testified that defendant beat Macon and yelled, "Where's the money, motherfucker?" Bomer then went into the bedroom and got the money out of Macon's wallet. He told defendant he had the money. Defendant kicked Macon one more time, Bomer pulled the phone cord out of the wall, and they left. A forceful act was used to accomplish the taking. Macon was most likely rendered unconscious and the money was taken from his wallet. The taking was not an afterthought; defendant, Bomer and Collins went to Macon's house with the purpose of getting money. We conclude that the evidence was sufficient to support a conviction of unarmed robbery.

Next, defendant claims that he was denied due process because the convictions were obtained by the use of tainted evidence, i.e., testimony given under the promise of leniency. The prosecution argues that this is not a constitutional issue, and that it was not preserved during trial as no objections were made during Bomer's testimony. Defendant admits that the issue was not preserved, yet claims the issue should be reviewed because it involves a fundamental issue of due process.

The Michigan Supreme Court has extended the plain error rule of *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994), to claims of unpreserved, constitutional error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id.*, citing United *States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, at 734. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously

affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Carines, supra* at 763-764, quoting *Olano, supra* at 736-737.

Defendant has cited no authority in support of his position that Bomer's testimony was tainted. Nonetheless, our Supreme Court has acknowledged "the inherent weakness of accomplice testimony that is presented by the prosecution. The problem with such testimony is two-fold. First, actual or implied threats or promises of leniency by the prosecutor will often induce an accomplice to fabricate testimony. Second, a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecutor." *People v Reed*, 453 Mich 685, 692; 556 NW2d 858 (1996).

Beside the fact that defendant merely speculates that Bomer's testimony was tainted, Bomer testified that he actually received a stiffer sentence than promised. He was already serving time when he testified at defendant's trial. The jury heard the full detail of the prosecution's plea offer. The court instructed the jury on accomplice testimony and regarding the promises made by the prosecutor. It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), citing *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). We conclude that the first two elements of the plain error test have not been proven; there was no plain error. Consequently, this issue has been forfeited.

Moreover, we agree with the prosecution that this is not a constitutional issue. Rather, defendant is challenging the credibility of Bomer as a witness. "[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Wolfe, supra* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Consequently, we will not disturb the conviction based on Bomer's allegedly tainted testimony.

Finally, defendant claims that his sentences are disproportionate. This Court reviews claims of disproportionality for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). An abuse of discretion may be found where a sentence is disproportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id.* While a sentence that is within the sentencing guideline range is considered presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), sentencing guidelines are not applicable to the sentencing of habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

Defendant argues that the twelve-year minimum sentences are disproportionate in light of his "past history." Defendant's criminal history included two convictions for property crimes, a conviction for possession of cocaine, a guilty plea to DUIL, a guilty plea to domestic violence, as well as fourteen traffic violations, two contempt of court charges, and one resisting arrest. He was also arrested in 1989 for carrying a concealed weapon, though the disposition of that charge is unclear.

The PSIR recommended a prison term of from fifteen to forty years. Defendant had no objections to the PSIR. The court noted that the penalty by virtue of the habitual offender statute was life or any term of years. At sentencing, the victim's daughter spoke about the horror of the attack on

her elderly father. The prosecution cited defendant's long criminal history and his complete lack of remorse.

The court noted defendant's extensive prior criminal record. The court remarked that it used the sentencing guidelines only as a benchmark to arrive at "a just and proportionate sentence." Based on the PSIR and the other information available, the court concluded that defendant should receive "the top end of the guideline range and then some" because of defendant's habitual offender status. Under these circumstances, defendant has not satisfied his burden of showing that the sentencing court abused its discretion in imposing a sentence of twelve to forty years.

Affirmed.

/s/ Michael J. Kelly
/s/ Martin M. Doctoroff
/s/ Jeffrey G. Collins